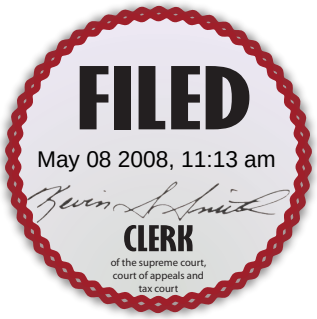

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IN THE
COURT OF APPEALS OF INDIANA

IN RE THE MARRIAGE OF:
GAIL (MARQUART) ZERMANO,

Appellant-Respondent,

vs.

DAVID M. MARQUART,

Appellee-Petitioner.

No. 29A02-0710-CV-915

APPEAL FROM THE HAMILTON SUPERIOR COURT
The Honorable William J. Hughes, Judge
Cause No. 29D03-0111-DR-795

May 8, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Gail Zermano appeals the trial court's modification of legal and physical custody of her child M.M. in favor of her ex-husband, David Marquart. We affirm and remand.

Issue

The sole restated issue is whether the trial court's decision to modify custody is clearly erroneous.

Facts

Gail and David were married in 1990, and M.M. was born in 1997. In 2002, Gail and David divorced. Pursuant to a settlement agreement, Gail and David had joint legal custody of M.M. The agreement also required the parties to remain in Hamilton County. Gail technically had primary physical custody of M.M., but David was to have parenting time with her for an equal amount of time as Gail had custody of her. The parties had to arrange when precisely David would have parenting time. After the divorce, Gail resided in Noblesville, where M.M. always has attended school in the Noblesville School District, while David has lived in Fishers, in the Hamilton Southeastern School District. When David had parenting time with M.M., he would drive her to school in Noblesville.

In 2004, David remarried. At around this time, communication between Gail and David regarding M.M. began to become strained. There were disputes regarding who should be M.M.'s pediatrician, dentist, and eye doctor. According to David, Gail had failed to take M.M. to the pediatrician for a well-check visit for four or five years. Gail often failed to respond to David's communications requesting to discuss M.M.'s health issues. David also had concerns about two non-English speaking nannies whom Gail

often left to care for M.M. that Gail did not address. Gail sometimes began using M.M. as an intermediary to schedule David's parenting time.

On June 22, 2006, Gail filed a petition to modify the custody arrangement so that she would be M.M.'s sole legal and physical custodian. The petition alleged that modification was required because of David's travel schedule, his remarriage, and his relocation to a residence farther away from M.M.'s school (although still within Fishers). The trial court conducted a hearing on the matter on June 27, 2007. During the hearing, David orally requested that the trial court award him sole legal custody of M.M., while leaving the 50/50 parenting time arrangement in place.

On August 15, 2007, the trial court entered an order, with findings, awarding David sole legal custody of M.M. It also named David M.M.'s primary physical custodian, but left the 50/50 parenting time arrangement in place. Instead of the parties arranging parenting time piecemeal, however, the order provided that David and Gail would have custody of M.M. on alternating weeks. Gail now appeals.

Analysis

The trial court here sua sponte entered findings with its order. If a trial court enters specific findings of fact and conclusions sua sponte, we apply the following two-tiered standard of review: whether the evidence supports the findings, and whether the findings support the judgment. Fowler v. Perry, 830 N.E.2d 97, 102 (Ind. Ct. App. 2005). The trial court's findings and conclusions will be set aside only if they are clearly erroneous, meaning the record contains no facts or inferences supporting them. Id. "A judgment is clearly erroneous when a review of the record leaves us with a firm

conviction that a mistake has been made." Id. "We neither reweigh the evidence nor assess the credibility of witnesses, but consider only the evidence most favorable to the judgment." Id.

We emphasize that sua sponte findings control only as to the issues they cover, and a general judgment standard will control as to the issues upon which there are no findings. Id. We will affirm a general judgment entered with findings if it can be sustained on any legal theory supported by the evidence. Id. On appeal, David relies on certain facts and evidence, not expressly mentioned by the trial court in its findings, as support for his argument that Gail was the source of most of the parties' communication problems. Because this was a general judgment entered with sua sponte findings, and not a case where the parties requested findings, we will consider those facts and evidence in deciding whether to affirm the trial court's order.

The trial court here modified both legal and physical custody of M.M. The physical custody modification, however, was relatively inconsequential, because the parties in theory should continue having equal parenting time for M.M. as in the past. The major impact on M.M. regarding physical custody will be with respect to her schooling. We will begin by discussing the modification of the legal custody arrangement, which represents the principal change to M.M.'s situation.

A key factor to consider when determining whether joint legal custody is appropriate is "whether the persons awarded joint custody are willing and able to communicate and cooperate in advancing the child's welfare." Ind. Code § 31-17-2-15(2). If the parties have made child-rearing a battleground, then joint legal custody may

no longer be appropriate. Carmichael v. Siegel, 754 N.E.2d 619, 635 (Ind. Ct. App. 2001). A trial court may modify a legal custody arrangement if there is a showing of changed circumstances so substantial and continuing as to make the existing custody order unreasonable.[1] Id. In reviewing a modification decision, we will not substitute our judgment for that of the trial court, even if the evidence might support a different conclusion. Meade v. Levett, 671 N.E.2d 1172, 1177 (Ind. Ct. App. 1996). "[I]t is particularly difficult for a reviewing court to second-guess a situation that centers on the personalities of two parents battling for control of a child." Kirk v. Kirk, 770 N.E.2d 304, 308 (Ind. 2002).

It is true that as a general rule, isolated acts of uncooperativeness by a parent will not support a change of custody. See Haley v. Haley, 771 N.E.2d 743, 748 (Ind. Ct. App. 2002). However, we cannot allow a parent with primary physical custody but joint legal custody to sow seeds of discord and then seek to obtain sole legal custody because of that discord. See Pierce v. Pierce, 620 N.E.2d 726, 731 (Ind. Ct. App. 1993), trans. denied. Where a parent with physical custody voluntarily causes joint legal custody to become unreasonable, that parent may lose custody of the children. Id.

The trial court here expressly found, "Child-rearing has become a battleground." App. p. 10. The evidence supports that finding. Gail and David in recent years have had numerous disputes regarding various aspects of M.M.'s upbringing, particularly with respect to medical and dental care. The evidence most favorable to the trial court's ruling

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[1] This differs from the standard for modifying physical custody. See Carmichael, 754 N.E.2d at 635 n.7.

in favor of David is that Gail was the one who primarily was failing to communicate adequately regarding these issues. The evidence most favorable to the ruling also is that David's decisions regarding M.M.'s medical and dental care were driven primarily out of concern for her well-being, while Gail was more prone to make medical and dental care decisions based on financial reasons, even where David was willing to bear the cost of treatment. The scheduling of David's parenting time also was becoming an issue, with M.M. often inappropriately being placed in the position of an intermediary in resolving when she would spend time with her father. David also had concerns regarding nannies who were caring for M.M. that Gail did not address.

As the trial court found, David has not acted perfectly with respect to the joint legal custody situation. Indeed, the trial court stated, "neither party has affirmatively earned sole legal custody." Id. at 9. We must consider, however, only the evidence most favorable to the judgment. Carmichael, 754 N.E.2d at 635. The issue of who was being uncooperative with whom is a very fact-sensitive determination, necessarily requiring the weighing of evidence and judging the credibility of witnesses, functions that rested exclusively with the trial court. See id. at 635-36. We will not disturb the trial court's decision that joint legal custody was not longer feasible, which is a point that Gail does not dispute. Moreover, we will not disturb the trial court's decision that as between David and Gail, Gail was the protagonist in most of the difficulties. The award of sole legal custody to David is not clearly erroneous.

Regarding physical custody as between two parents (where no third-party custodian is involved), a court may not modify a child custody order unless the

modification is in the best interests of the children and there is a substantial change in one or more of the factors set forth in Indiana Code Section 31-17-2-8. See I.C. § 31-17-2-21(a). Those factors are:

> (1) The age and sex of the child.
>
> (2) The wishes of the child's parent or parents.
>
> (3) The wishes of the child, with more consideration given to the child's wishes if the child is at least fourteen (14) years of age.
>
> (4) The interaction and interrelationship of the child with:
>
> (A) the child's parent or parents;
>
> (B) the child's sibling; and
>
> (C) any other person who may significantly affect the child's best interests.
>
> (5) The child's adjustment to the child's:
>
> (A) home;
>
> (B) school; and
>
> (C) community.
>
> (6) The mental and physical health of all individuals involved.
>
> (7) Evidence of a pattern of domestic violence by either parent.

Stability is a crucial factor that trial courts must take into account when determining the best interests of a child in the context of a custody modification. Harris v. Smith, 752 N.E.2d 1283, 1288 (Ind. Ct. App. 2001).

It was logical with David being named M.M.'s sole legal custodian that he also be named her primary physical custodian. This case is unusual in that although the trial court technically modified primary physical custody of M.M. to David, the amount of time that M.M. spends with each of her parents is unchanged. As before, David and Gail are to split parenting time with M.M. 50/50. M.M.'s communities and proximity to friends and family will not change at all as a result of this order. The trial court did alter the previous 50/50 parenting time arrangement, so that instead of the parties arranging parenting time ad hoc, each parent trades off having M.M. for one week at a time; additionally, if a parent is not able to spend their entire week with M.M., make-up time is not required.

We are concerned that the trial court's order fails to mention what might be an unintended consequence of the change in physical custody. Under Indiana's legal settlement statutes, because David has now been named M.M.'s primary physical custodian, she may be required to switch schools and attend in the Hamilton Southeastern District, the district in which David resides. See I.C. § 20-26-11-2(3). Because the record is silent as to whether the parties and trial court were cognizant of this fact, this circumstance may need to be addressed by the trial court. We do not know if David and Gail have reached any sort of agreement concerning this situation. The evidence in the record is that M.M. was doing well in the Noblesville School District and was well-adjusted there. There was no suggestion by David that Hamilton Southeastern schools are better suited for her.

It is true that children, even when their parents are not divorced, often are required to switch schools because of changes in residence. The trial court here obviously was rightly concerned with providing stability for M.M. Forcing her to switch schools and become acquainted with all new classmates and teachers could be destabilizing. Under the current custody arrangement she still will be living in Noblesville with Gail for half of the year, and David, who is self-employed, did not have difficulty with or objection to driving M.M. from his home in Fishers to her school in Noblesville.

This court previously has approved a trial court's order requiring children to attend school in the district where the non-primary physical custodian resided, where there was evidence the children had always attended school in that district. See Tarry v. Mason, 710 N.E.2d 215, 218 (Ind. Ct. App. 1999), trans. denied. We also note the existence of Indiana Code Section 20-26-11-2.5, which states:

> (a) In the case of a student described in section 2(3) of this chapter, the:
>
> (1) parent granted physical custody by a court; or
> (2) student, if the student is at least eighteen (18) years of age;
>
> may, not later than fourteen (14) days before the first student day of the school year, elect for the student to have legal settlement in the school corporation whose attendance area contains the residence of the student's mother or the school corporation whose attendance area contains the residence of the student's father.
>
> (b) An election under subsection (a) may be made only on a yearly basis.
>
> (c) The parent or student who makes an election under subsection (a) is not required to pay transfer tuition.

Thus, under this statute, David could execute an election for M.M. to continue attending school in Noblesville, rather than in the Hamilton Southeastern district, without having to pay transfer tuition. Should David execute such an election, at least as long as Gail continues to live in Noblesville, we believe the stability of M.M.'s situation would be buttressed, and it certainly may be in M.M.'s in best interests.

Conclusion

The trial court's decision to grant David sole legal custody and primary physical custody of M.M. is not clearly erroneous. We remand for the trial court to consider the school situation and if an arrangement between the parties has been forged, to make such arrangement a part of the record. If no such arrangement has been made, we strongly suggest that the considerations we have discussed be reviewed and appropriate action taken.

Affirmed and remanded.

CRONE, J., and BRADFORD, J., concur.